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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996 Amendment of the Commission's Rules and Policies Governing Pole Attachments	CS Docket No. 97-151

REPLY COMMENTS OF COMCAST CABLE COMMUNICATIONS, INC., *ET AL.*

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MARCUS CABLE OPERATING CO., L.P.
RIFKIN & ASSOCIATES
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TEXAS CABLE & TELECOMMUNICATIONS ASSOCIATION
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Comcast Cable Communications, Inc., Charter Communications, Marcus Cable Operating Co., L.P., Rifkin & Associates, Greater Media, Inc., Texas Cable & Telecommunications Association, Cable Telecommunications Association of Maryland, Delaware & District of Columbia, and the Mid-America Cable TV Association respectfully submit these Reply Comments in response to the Commission's Notice of Proposed Rulemaking issued August 12, 1997 in the above-captioned proceeding.

I. THERE IS NO "GAP" IN THE REGULATION OF POLE ATTACHMENTS

In their continuing efforts to eviscerate pole regulation, several utilities profess to have found major gaps in the reach of the Pole Act. The electric utilities contend that Section 224 does not apply to a cable systems that provide "dark fiber" services.[1] Another group of utilities attempts an equally distorted interpretation of the statute, claiming that "two-way video

[1] *See, e.g.,* TUEC Comments at 4-6. *See also* EEI/UTC Comments at 14. Comments of American Electric Power, *et al.* ("AEP") at 9-11, 28.

or information services" are not regulated under Section 224. The contention is premised on a misreading of the Act, and stands in marked contrast to others in the electric industry.[2]

The Communications Act was specifically amended in order to extend Section 224 regulation to CAPs, diversified cable systems, and providers of other telecommunications services. The electric utilities contend that because "dark fiber" services offered by ILECs are not presently regulated as tariffed common carrier services, dark fiber cannot be regarded as a "telecommunications service" for which a regulated rate cap applies in pole attachments. In other words, the utilities are claiming that if a cable system offers any telecommunications service which is not regulated as a Title II common carrier offering, it is outside of Section 224. This analysis suffers a number of major flaws.

First, the authority on which the utilities rely does not support their conclusion. The pre-1996 Act case, *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994), and subsequent Commission order on which they base their analysis had a very narrow holding. It held only that the Commission had failed to document that ILECs had sufficiently held out dark fiber services to meet the common law definition of common carriage. The case defines only how the FCC will handle its direct regulation of services, not with how the FCC will regulate poles supporting the facilities transporting such services. Notwithstanding the narrow application of its decision, the court reconfirmed that the Commission retains its "reasonably ancillary" authority over such services.

Likewise, the Commission has reiterated that it has authority to order a "holding out" if the public interest so requires, and particularly if the carrier were attempting to "evade

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[2] *See* Comments of New York State Investor-Owned Electric Utilities at 3-4, 10-11; Duquesne Light Co. Comments at 29.

its Title II obligations."[3] The FCC has ample authority to treat dark fiber leases as protected by Section 224. They fall squarely within the Commission's obligation to ensure that rates, terms and conditions of pole attachments are just and reasonable.

Section 224 was specifically amended to assure that the vagaries of regulatory classification of services provided over pole attachments did not determine whether or not pole attachments would be regulated. The Act, therefore, was adopted in 1978 to overturn the *California Water* case[4] and to permit pole regulation regardless of whether pole space could itself be treated as a tariffed common carrier offering. Section 224(a) of the Act was amended in 1996 so that the gradual deregulation of pole owners in their core businesses would not cause their poles to fall outside the scope of Section 224.

> (a) As used in this section:
>
> (1) ~~The term "utility" means any person whose rates or charges are regulated by the Federal Government or a State and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication.~~ *The term 'utility' means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.* Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State;

Thus, the Commission is fully charged with regulating pole attachments by initial congressional design and subsequent amendment irrespective of whatever classification may be attached to the underlying services provided.

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[3] Investigation Of Special Access Tariffs Of Local Exchange Carriers, Memorandum Opinion and Order, FCC 97-42 (Feb. 14, 1997) at ¶¶ 19-22.

[4] *California Water and Telephone Co., Tariff F.C.C. No. 1 and F.C.C. Tariff No. 2 for Use by Community Antenna Television Systems*, 64 F.C.C.2d 753 (1977).

Third, the utilities offer an exceptionally constrained reading of the statute that runs counter to the fundamental purposes of Section 224 and the 1996 Act to *expand* facilities-based competition, not to narrow it to a world of "competitors" owned or controlled by the pole owners. For example, the Act was specifically amended to broaden, not constrain, the parties covered by its terms.

> (4) The term "pole attachment" means any attachment by a cable television system *or provider of telecommunications services* to a pole, duct, conduit, or right-of-way owner or controlled by a utility.[5]

The Act provides for access by all these attaching parties to poles, and then imposes two rate formulae—one for cable, one for telecommunications. To hold that a telecommunications provider could have access, but that the pole owner could charge any attachment rate it chose if the attaching party ever offered more that plain vanilla cable or tariffed common carrier services would nullify the access provisions so central to the fundamental purpose of the 1996 Act. The Commission must read a statute to give effect to all its portions. Indeed, given the expectation of the 1996 Act that competition would replace tariffed monopoly regulation, it would be bizarre to construe Section 224 to apply only to attaching parties who *do not* offer new competitive services. If a cable operator offers dark fiber on an ICB basis, and that fiber is used, for example, for CAP connections, it is clearly offering "telecommunications services" within the framework of Section 224.

TUEC and the others are proposing a return to restrictive leaseback tariffs and pole agreements through which pole owners sought to limit the services provided over competitive broadband facilities attached to their poles—an approach which they have advocated

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[5] 47 U.S.C. § 224(a)(4).

unsuccessfully in the past to circumvent the access requirement of Section 224(f)(1).[6] Indeed, Ameritech offers the most distilled version of the pole owner's ultimate objective: ***"utilities must be given the latitude to circumscribe the services offered by "pure" cable television systems to those described in Section 602(6) of the Act."***[7] Utility efforts to indulge the anticompetitive impulse were long ago held unlawful by the Commission.[8] It would turn the 1996 Act on its head to construe the Act as resurrecting the very abuses that led to pole regulation in the first place, and to constrain, rather than expand, facilities-based competition.

II. THE COMMISSION SHOULD REJECT UTILITY CALLS FOR ANNUAL SWORN CERTIFICATIONS AND HEARING PROCEEDINGS

Many utilities advocate a presumption that all cable operators attachments are telecommunications attachments[9] and the use of annual sworn certifications concerning the nature of cable operators' service offerings.[10] Such a presumption is absurd today, and was rejected for that very reason when presented in 1997 to the New York State Public Service Commission after full hearing.[11] We have no objection to cable operators and utilities working out mutually

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[6] *See Local Competition Order* ¶ 1164 ("We will not require telecommunications providers or cable operators seeking access to exhaust any possibility of leasing capacity from other providers . . . . We do not wish to discourage unduly [facilities-based competition] solely because [leasing capacity] might better suit the preferences of incumbent utilities with respect to pole attachments.")

[7] Ameritech Comments at 4 (emphasis supplied).

[8] *Section 214 Certificates*, 21 F.C.C.2d 307, 316, *modified*, 22 F.C.C.2d 746 (1970), *aff'd*, 449 F.2d 846 (5th Cir. 1971). Plaintiff's First Statement of Contentions & Proof at 207, *United States v. AT&T*, Civ. No. 74-1698 (D.D.C. 1978); Communications Act Amendments of 1977, Hearings on S. 1547 Before the Subcommittee on Communications of the Senate Comm. on Commerce, Science, and Transportation, 95th Cong., 1st Sess. 37 (1977).

[9] *See, e.g., id.* at 21-22, 28.

[10] *See, e.g.,* Comments of AEP, *et al.* at 29-32.

[11] *In re Certain Pole Attachment Issues Which Arose in Case 94-C-0095,* Case 95-C-0341, N.Y. P.S.C. Opinion and Order at 16-17 (June 17, 1997).

agreeable procedures in which cable operators provide notice, after 2001, that certain poles are being used for telecommunications services, and adjusting billing records accordingly. But there is no basis for a presumption that all poles are being so used, nor for any burdensome notice procedure which would provide advance competitive intelligence before new services are actually deployed.

Many utilities have also renewed the call for a very narrow definition of cable and very expansive vision of what would trigger billing at the telecommunications rate. At present, "cable services" go beyond one-way downstream-only video programming. Systems also provide upstream pay-per-view signalling, the SEGA Channel, PEG channels, and government institutional networks which often carry computer data, for example, among schools. These are all contemplated by Title VI,[12] and should not be penalized with higher telecommunications pole rates.

III. OVERLASHING SHOULD BE PERMITTED IN THE MANNER PRESCRIBED IN THE INITIAL COMMENTS OF COMCAST AND NCTA

NCTA and Comcast explained in their initial comments why overlashing should be freely permitted. Liberal overlashing policies deny utilities the ability to restrict the continued development of the broadband network, and accounts for the fact that because fiber optic cable is by far the lightest attachment on the pole, overlashing presents no serious engineering concerns.

NCTA and Comcast further urged that the Commission adopt rules providing no additional charges for overlashed attachments where the facilities are owned by the cable

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[12] 47 U.S.C. § 531.

operator—whether a mixed (video and data) fiber bundle, or to be used entirely for nonvideo services. Only where the cable operator allowed a third party to overlash the third party's facilities to the cable operator's strand should another attachment charge apply. Because, however, the overlashed attachment does not occupy more pole space than the strand and the existing conductor, the additional charge should reflect only a portion of the unusable space on the pole, not any additional usable space.

We believe that this approach best promotes the Commission's mandate to encourage facilities-based competition while restraining the utilities from abusing their position as monopoly providers of pole space to competitive advantage in the market for communications services.

The utilities argue that advance permitting for overlashing should be required.[13] As predicted, the utilities claim that overlashing threatens public safety, even advancing a small handful of unattributed "horror stories" purporting to illustrate the public safety hazards of overlashes. The sheer paucity of such examples clearly demonstrates that public safety concerns are a subterfuge for delaying the onset of competition.[14] Those who deal in communications engineering on a practical basis agree: overlashing is acceptable, and that there are no genuine safety issues.[15]

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[13] *See, e.g.*, New York State Utilities Comments at 3-4; AEP, *et al.* Comments at 50-51; Duquesne Light Comments at 26-27.

[14] Indeed, the claim by one group of electric utilities that "[u]tility lore is rife with anecdotal evidence of poles being damaged or snapping in two" without a single concrete example adds to the mythical aura surrounding the utilities public safety incantations. *See* Comments of Carolina Power & Light Co. ("CP&L"), *et al.* at 8.

[15] *See, e.g.*, RCN Comments at 6-7; AT&T Comments at 5-9; U S West Comments at 10.

Requiring cable operators and others to secure permits in advance of overlashing provides utilities with the dual benefits of (1) delaying deployment for as long as it takes to "process" the overlash application, and (2) knowing, *in advance*, the exact locations of strategically important network routes (and potential customers). This is why the pole owners' "concerns" about overlashing were dormant for thirty years, when cable routinely overlashed coaxial trunk and feeder to existing strand; but became acute overnight as cable operators began to overlash fiber. Fiber is lighter, but poses considerably more competitive threat to the utilities. Little imagination is required to understand that a diversified utility competing with cable operators and CLECs would be more than tempted to delay overlash permit processing with one hand while marketing customers located in the areas covered by the attacher's strand maps with the other. One very recent case proves this view.

On October 20, 1997, cable operators in the state of Maryland filed a pole attachment complaint before the Commission challenging systematic efforts of Bell Atlantic—Maryland, Inc. ("Bell Atlantic") to delay cable-operator fiber deployment.[16] Bell Atlantic has shut down a number of cable-operator construction projects throughout Maryland, in order to delay the deployment of competing fiber networks. In so doing, Bell Atlantic has (1) demanded that cable operators file advance permits for all overlashing; (2) required that overlashes installed without an advance permit be torn down until Bell Atlantic grants permits; (3) sought to enlist the complicity of major electric utilities in Bell Atlantic's Maryland service area in Bell Atlantic's overlashing scheme; and (4) ordered cable operators to produce detailed engineering maps,

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[16] *Cable Telecommunications Association of Maryland, Delaware & District of Columbia et al. v. Bell Atlantic—Maryland, Inc.*, PA No. 97-__ (Complaint filed October 20, 1997).

including those complete with fiber-optic strand count, and type, function, locations and manufacturer of all ***active*** electronic components.

By raising "safety" concerns, the utilities' objectives in this case are (a) to delay deployment of competing fiber networks, (b) drive up their competitors' costs (by forcing plant wreck-outs) (c) find new service customers (or ascertain the identities of those potentially dissatisfied with current service) and (d) on a flyer, see what competitive intelligence it might be able to trick operators into providing.

Whether through forms required by pole attachment agreements, or unreasonable demands in the field, utility efforts to gain strategically sensitive information concerning potential customers and network routes are unlawful.[17] Far from being obsolete as the utilities claim, the teachings of *Heritage*,[18] and the cautions of the Commission's January 1995 Public Notice[19] have never been more timely. The Commission should take the next step, and prohibit utilities from limiting overlashing, so long as the cable operator adheres to generally accepted engineering standards.

IV. THE COMMISSION SHOULD ADOPT THE PROPOSALS OF COMCAST, NCTA AND OTHERS WITH RESPECT TO COUNTING ATTACHING PARTIES FOR THE PURPOSES OF CALCULATING USABLE SPACE

The utilities advocate elimination of all parties on the pole with the exception of a CLEC or telecommunications affiliate of a cable operator. They argue that the power company,

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[17] *Marcus Cable Associates, L.P. v. Texas Utilities Electric Co.*, PA No. 96-002, DA 97-1527, 1997 FCC LEXIS 3803 (July 21, 1997) (*application for review* filed August 20, 1997).

[18] *Heritage Cablevision Assoc. of Dallas, L.P., et al. v. Texas Utilities Electric Co.*, 6 FCC Rcd. 7099 (1991), *recon. dismissed*, 7 FCC Rcd. 4192 (1992), *aff'd, Texas Utilities Electric Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

[19] *Common Carrier Bureau Cautions Owners of Utility Poles*, Public Notice, DA 95-35, Mimeo 51600 (CCB, January 11, 1995) ("we are concerned that there could be serious anticompetitive effects from preventing cable operators from adding fiber to their systems").

the power company's "internal communications" facilities, the ILEC, and government users and the cable operator providing "traditional" cable services all should be eliminated from the count of "entities" who share in the cost of unusable space. The utilities' objective is to force all the costs of the unusable space onto providers of new competitive services. This approach does not comport with the statutory language or with the manner in which pole plant is used.

Memories for the 1996 Act's history must be very short, if we are to account for the pole owners' extraordinary rendition of the Act's "intention" for allocating nonusable space. An early version of the bill apportioned nonusable space in proportion to usable space used, as has been the case since 1978.[20] The version passed by the Senate on June 15, 1995 proposed to allocate the nonusable space equally among all *attachments* on the pole.[21] The compromise was to charge 2/3 of the support costs equally among attaching "entities."

> The Act requires that:
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> > *(2) A utility shall* ***apportion the cost*** *of providing space on a pole, duct, conduit, or right-of-way other than the usable space* ***among entities*** *so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs* ***among all attaching entities.***[22]

It does not say "some of" the entities or entities excluding the owners. Indeed, it is clear from the history that "entities" referred both to "entities that hold an ownership interest in the pole" and to "an entity that obtains an attachment through a license."[23]

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[20] *See, e.g.,* S. Rep. No. 104-23 (March 30, 1995).

[21] 141 Cong. Rec. S8570, S8579 (June 16, 1995).

[22] 47 U.S.C. § 224(e)(2) (emphasis added).

[23] S. Rep. No. 104-23 (March 30, 1995).

Now, the revisionists claim that this plain language really means that electrics offering only electric service are not "entities" to share in the 2/3 costs; that ILECs offering only POTS are not "entities" to share in the 2/3 costs. One party even claims that a cable operator offering only cable services could not be counted as an "entity" when calculating the rate for a CLEC applicant. Suddenly, all of the parties on the pole have disappeared and become non-entities.

There is no hidden definitional limitation in these plain language amendments, as a review of changes to the Act will demonstrate. Pole owners are clearly "entities" under Section 224:

> *(i) An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other* ***entity (including the owner of such pole, duct, conduit, or right-of-way).***[24]

ILECs are also "entities." They were excluded from the definition of *telecommunications carriers* who would otherwise be entitled to invoke the price formulae of 224(e), so their joint use agreements with power would not be subject to the new formula. This accounts for the initially cautious approach of the United States Telephone Association in the *Local Competition* proceeding, and in Docket No. 97-98 having their *out-of-region* attachments governed by 224 price formulae.[25] But this careful definition of telecommunications quite precisely does not use the term which covers which pole owners are covered. Pole owners include in 224(a) *"a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or*

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[24] 47 U.S.C. § 224(i) (emphasis added).

[25] CS Docket No. 97-98, Comments of the United States Telephone Ass'n at 11-16 (filed June 27, 1997).

controls poles". Nor does it define who is an "*attaching entity*" for allocating nonusable space, which is not so narrowly defined.

The revisionists' arguments are ill founded. Allocating 2/3 of support costs to all entities on an equal basis was a legislative compromise between those who wanted equal shares and those who wanted a share in proportion to usable space used or similar principles of proportionality. There was never a suggestion than any entity would be excused from the equal allocation of 2/3 of cost which stood as the final compromise. Efforts to transform the compromise into anything else are simply not faithful to the legislative history. Such efforts do not even track the statutory language—which specifically allocates costs among "entities," *not* among parties entitled to a regulated pole rate, *not* among telecommunications carriers, *not* among parties occupying the communications zone, nor just among any other narrow subset invented by the revisionists. The revisionist's efforts also lead to preposterous results. For example, GTE's formulation, in which ILECs never count, would have a CLEC pay all of the allocable (2/3) costs for nonusable space when using a two-party pole—that is, to pay more than GTE itself.

Our proposal, by contrast, honors the legislative compromise, is workable, and solves what otherwise becomes intractable problems in counting entities. We have proposed, in essence, that all parties attached to a pole be counted for the purposes of allocating the unusable space on a utility pole, including the pole owner and government users. Our proposal enjoys widespread support. U S West specifically endorses treating ILECs as entities to whom chargeable nonusable space costs may be allocated as an "entity."[26]

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[26] *See e.g.*, Comments of U S West, Inc. at 6-10.

Some utilities have argued that attachments by the government should not count as entities on the pole. They claim that the occupation of space should be regarded as a right of way cost to be borne by all attaching parties.[27] We disagree: cable operators and CLECs each must obtain right of way authorization directly from local and state governments. None argues that these attachments do not benefit from the support space. Moreover, Section 224's allocation is made specifically among all entities—*not* just among parties paying a regulated pole rate *nor* just among commercial entities. Nor do the utilities claim that they receive no compensation. They are quite circumspect to simply say that "often" they are not paid.[28] But this is also the arrangement which many utilities and ILECs have under joint use agreements, in which neither pays the other but each exchange duties and responsibilities. Yet ILECs, electric utilities (and government users) all benefit from and share in costs for the nonusable space under the 1996 amendments.

American Electric Power, *et al.* suggest that electric utility telecommunications lines should not be counted as attaching entities if they are used solely for internal communications and not placed in communications zone.[29] The Boston Edison/RCN joint venture illustrates the reality lurking behind the theory. Edison deployed an extensive "internal" network, and then turned the fiber over for exclusive use by the RCN affiliate. It strains credulity to believe that the enormous quantities of fiber being rapidly deployed by electric utilities is anything but a competitive telecommunications network, as ETC has repeatedly encouraged.

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[27] *See, e.g.,* Comments of AEP, *et al.* at 41-42; Duquesne Light Co. Comments at 42.

[28] *See, e.g.,* Duquesne Light Co. Comments at 42 ("agencies ***often*** do not pay . . .") (emphasis added); Comments of AEP, *et al.* at 41-42 ("government entities ***generally*** do not pay . . .") (emphasis added).

[29] Comments of AEP, *et al.* at 39-42.

Moreover, placement of such facilities in the power or neutral zone merely illustrates the discriminatory favoritism which the utilities grant their own affiliates. It would only aggravate the injustice to exempt such favorites from paying for a share of the unusable space, like their competitors.

A. Entity Presumptions

The presumptions offered in our initial comments—the only ones supplied in initial comments with an empirical basis—provides the foundation necessary to accomplish this end. We would urge the Commission as we did in our initial comments, that any study used to establish presumptions be projected to the first year of implementation of the new telecommunications rate, 2001.[30] We also reiterate our request that the Commission view any utility-sponsored survey with skepticism because some utilities may understate the numbers of attaching parties on the poles in order to collect a higher telecommunications rental rate. We do not believe, however, that it is advisable to order utilities or others to perform a new survey from

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[30] To the extent that the Commission were either to sponsor or require some kind of survey to arrive at a presumptive number of attaching parties, the comments of ICG Communications, Inc. ("ICG") presents one reasonable approach. ICG notes that some of this information may already be contained in data from surveys data that have been conducted as a routine part of pole-plant maintenance and administration, and that those utilities maintaining such information be required to submit to the Commission an estimate of the number of attaching parties in a subsequent proceeding. Reliance on such survey data should only be allowed to the extent that such data counts all attachments on the pole, and that any costs of such surveys are shared in a manner consistent with Commission precedent. *See, e.g., Newport News Cablevision, Ltd. v. Virginia Elec. and Power Co.*, 7 FCC Rcd. 2610 (1992); *First Commonwealth Communications, Inc. v. Virginia Electric and Power Company d/b/a Virginia Power Company*, 7 FCC Rcd. 2614 (1992); note 31, below. Utilities' attempted use of survey records that exclude that utility's own attachments should be specifically rejected. *See, e.g.,* SBC Comments at 25. To this end, and to limit any utility effort to skew such a survey in its favor, we endorse the view sponsored by AT&T that in any survey that the utilities be permitted to submit in support of such have at least one foreign (whether cable, ILEC, or CLEC attacher). AT&T Comments at 14, n. 15.

scratch, particularly now, given that we are more than three years away from the implementation date.[31]

As that date approaches, the utilities likely will be approaching parties the utilities believe will be subject to the telecommunications rate with their proposed new rates for telecommunications attachments. The results of any survey conducted along the lines of ICG's suggestion, together with the studies Comcast *et al.* propounded in their initial Comments would more than give the Commission the data necessary to project an attaching party presumption for the year 2001 and allow the parties an objective benchmark on which to base their negotiations or, if necessary, initiate a rate complaint. As with other presumptions under the Commission's pole regulatory regime, the parties would be free to rebut any presumptions with specific credible contrary evidence.

V. THE COMMISSION SHOULD NOT ALLOW UTILITY ADVOCACY OF NEGOTIATION BE A SUBTERFUGE FOR UNILATERAL IMPOSITION OF ADHESION CONTRACTS

We will not repeat here all of what has been stated elsewhere concerning utility advocacy of negotiations. To briefly recap, however, our experience has been that while some

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[31] We have one additional (and very significant) reservation about requiring or even encouraging a utility-sponsored survey. We are concerned that if there is an ongoing requirement or incentive for utility-sponsored attachment surveys, cable operators and other attaching parties may unfairly—and unknowingly—bear the cost burden for such a survey. Utilities have been known to impose charges on cable operators for surveys (or parts thereof) with little or no relation to the cable operator's pole attachments. Here, utilities should not be allowed to shift the costs of what we reasonably expect would be rather self-serving surveys to cable operators and others. *See, e.g., Newport News Cablevision, Ltd. v. Virginia Elec. and Power Co.*, 7 FCC Rcd. 2610 (1992); *First Commonwealth Communications, Inc. v. Virginia Electric and Power Company d/b/a Virginia Power Company*, 7 FCC Rcd. 2614 (1992). While many utilities in fact take a principled and responsible approach to field surveys, others do not, particularly as the pressures to cut utility operating costs and compete in new lines of businesses increase. Survey costs today remain a contentious issue, *Cable Texas, Inc. v. Entergy Services, Inc., et al.*, PA No. 97-006 (Complaint filed July 9, 1997) (survey-cost complaint pending resolution), and care should be take here not to exacerbate this contentiousness by encouraging surveys for which the utility might be tempted to exact attacher contribution, whether or not the attacher knows it.

utilities make good faith efforts to negotiate pole attachment agreements with cable operators, most pole attachment agreements are utility-favoring adhesion contracts. The experience of the cable television industry (as now being experienced by CLECs) is that negotiation, in most instances, is a charade. The utilities seek to leverage this charade to still greater advantage by arguing that each attaching party should be foreclosed from the Commission's complaint processes for 180 days while it "negotiates" with the utilities.[32]

Negotiation requirements in the existing pole-complaint rules more than adequately address the concern that an attacher attempt to negotiate before requesting the Commission to review a matter. The utilities' proposal that an attacher engage in what in many cases is likely to become a futile six-month campaign to negotiate an agreement prior to filing a complaint so obviously disserves competition that it should be rejected out of hand.

VI. THERE IS NO BASIS TO RADICALLY REVISE OTHER ELEMENTS OF THE POLE ATTACHMENT FORMULA

As in the Commission's prior pole attachment rulemaking this year, the utilities argue and re-argue long-settled issues, many of which the Commission has not solicited comment, perhaps on the theory that repetition breeds familiarity, and that familiarity will spontaneously transform into merit.

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[32] *See, e.g.*, UTC/EEI Comments at 7; Duquesne Light Co. Comments at 18; CP&L Comments 19-20. One group of utilities cites two pending pole attachment cases purportedly to sustain their claims of reasonableness of a 180-day rule as a Commission precedent to the filing of a pole attachment complaint. In one of those cases, a complaint to seek refunds of unlawful charges for a 1996 pole-count survey, the cable operator had attempted to negotiate with the utility for more than seven months prior to the complaint, but the utility sought to exclude evidence of those negotiations from the record in that proceeding. NCTA Reply Comments in Docket 97-98 at 13-17 (filed Aug. 11, 1997). In the second, the cable operators attempted to negotiate directly with the utility for 60 days prior to filing a complaint and made no progress to speak of. After the Complaint was filed, however, the utility made a number of extraordinary concessions that the cable operators had sought in the pre-complaint stages and which the utility should have made there. Requiring a 180-day "negotiation period" is tantamount to a blank check for utility delay.

A. Pole Rates Should Not Be Set According To Reproduction or "Forward-Looking" Costs

First, as NCTA has shown previously, reproduction (or "forward-looking") cost is not a legitimate basis for the pricing of pole attachments as some utilities here again advocate.[33] Reproduction cost theory, in essence, asks the regulator to assume that the utility will replace the entirety of its plant at today's costs, ignoring the true economics of the plant such historical costs, depreciation charges taken over time and the like.[34] The utilities claim that reproduction costs more closely approximate "market" prices. The fundamental fallacy of this subversive argument, of course, is that there is no "market" for pole attachments. They are essential, yet have no viable alternatives.

The 1996 Act seeks to facilitate the onset of free-functioning facilities-based competition through a series of structural and other measures—such as ILEC entry into long distance, ILEC compliance with the 14-point checklist, unbundled access and resale of critical network elements, extension of pole regulation to telecommunications carriers—to achieve this end. It does not, however, assume from day one that such markets exist, and jettison all regulation in favor of market forces. But this is the view the utilities advocate.

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[33] Duquesne Light Co. Comments at 13-17; Union Electric Company Comments at 11-16; Ohio Edison Company Comments at 12-16.

[34] Utilities have also advocated using reproduction costs for the establishment of conduit occupancy rates. *See, e.g.*, Duquesne Light Co. Comments at 47. While ostensibly to advocate a liberal definition of unusable conduit space tied to construction and materials costs, EEI's/UTC's (perhaps Freudian) call that "the surrounding earth" be included in conduit rates is as pure a statement of the utility position on the pricing of essential poles and conduit facilities that the Commission is likely to see. EEI/UTC Comments at 29.

The FCC rejected reproduction cost theories as contrary to the Act when setting the current formula.[35] No certified state calculates pole rate base on a reproduction-cost basis. Instead, reproduction costing has been affirmatively rejected in California,[36] Michigan[37] and New York,[38] after the utilities proffered $30 pole rents based on reproduction costs.[39]

B. The Neutral Zone Should Be Assigned To The Electric Utilities

Second, the utilities once again argue that the costs of the neutral zone be assigned to attaching parties, and not the electrics utilities. As has been shown time and again,[40] the electric industry's arguments that the neutral zone is required for the safety of communications workers is just a repetition of the same arguments that it advanced and lost in the 1978 original pole rulemaking.[41] Nothing has changed since then to justify their acceptance now, nearly 20

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[35] *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C.2d 59, 65-66 (May 23, 1979) ("With regard to the argument advanced . . . that replacement costs should be taken into account in determining pole attachment rates, we do not consider such costs to be reflective of actual costs incurred. We believe historical costs most accurately reflect actual or embedded costs.").

[36] Cal. Pub. Util. Code § 767.5 (Deering 1996) ("The basis for computation of annual capital costs shall be historical capital costs less depreciation.").

[37] *See Consumers Power Co., et al.*, Mich. Pub. Serv. Case Nos. U-10741, U-10816, U-10831 at 20 (Feb. 11, 1997), *reh'g denied* (April 24, 1997), *appeal pending, Detroit Edison Co et al. v. Michigan Public Service Comm'n et al.*, Nos. 203480 & 203421 (Mich. Ct. App. filed May 22, 1997) (Ex. 1 to Initial Comments of NCTA, *et al.*).

[38] *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, N.Y. Pub. Serv. Comm'n Case No. 95-C-0341 at 11 (Issued and effective June 17, 1997) (Ex. 2 to Initial Comments of NCTA, *et al.*).

[39] We note, moreover, that one electric utility is currently purporting to "offer" cable operators an "optional" $30.00 per-pole annual "bundled" attachment rate, for which Entergy purports to offer largely undefined and apparently valueless "services." Cable operators have challenged this "optional" bundled rate. *Texas Cable & Telecommunications Ass'n, et al. v. Entergy Services, Inc., et al.*, PA No. 97-005 (Complaint filed July 9, 1997).

[40] *See, e.g.*, Docket 97-98 NCTA Reply Comments at 38-41.

[41] *Adoption of Rules For The Regulation Of Cable Television Pole Attachments*, CC Docket No. 78-144, 72 F.C.C.2d 59 (1979); 77 F.C.C.2d 187 (1980).

years later.[42] But for the use by the electric company of the top portions of the pole, there would be no need for the neutral or safety zone extending 30 to 40 inches from the top communications conductor to the bottom electric conductor. In order for the electric company's attachments to comply with NESC requirements it, needs the aggregate vertical space clearances that communications attachments need, plus the space that the communications contacts occupy, plus the neutral zone. Finally, it is the electric company's conductors that are inherently dangerous; the required separation that the neutral zone provides is no different from the separation that utility must maintain between and among its attachments in the electric space. For these reasons, and for the purposes of the telecommunications rate, the neutral zone must be treated as unusable space.

C. Rates Should Be Calculated On A Net Basis

The FCC has long had a preference for using net calculations are far preferable than using gross calculations.[43] The utilities continued advocacy of gross-based rate calculations is motivated more by the desire to increase rates, than by any underlying policy justifications. As NCTA has shown previously,[44] not only is "all gross" a misnomer (because of the need to perform net-based calculations to derive elements of the pole rate such as the rate of return, and

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[42] In addition to this attempt to re-hash old arguments, the electric utilities argue that because the Commission does not consider the utility's tallest poles in enumerating space allocations, it must disregard the utility's shortest poles for the purpose of calculating the net cost per bare pole. This argument, of course, compares apples with oranges. The Commission uses investment in all poles when calculating its rates to calculate carrying costs. *Teleprompter v. Southwest Video Corp.*, PA No. 80-0016, Mimeo 33920 (Oct. 24, 1983). Utilities may always produce actual pole height records.

[43] *See, e.g., TeleCable of Piedmont, Inc., Cencom Cable Income Partners, II, L.P., Cencom Cable Entertainment, Inc., and Cencom Cable Television, Inc., TeleCable of Spartanburg, Inc. and TeleCable of Greenville, Inc. v. Duke Power Company*, PA 90-0003, PA 91-0001, PA 91-0002, DA 95-1362 (June 15, 1995), *Riverside Cable TV Inc. v. Arkansas Power & Light Co.*, PA-85-0001, Mimeo No. 4813 (June 30, 1985).

[44] NCTA Reply Comments in Docket 97-98 at 29-33 (filed Aug. 11, 1997).

in some cases the depreciation carrying charge) but it fails to account for investments made by cable operators for pole replacements, and for depreciation charges that the utility has claimed over the assets' life. For these reasons, utility advocacy to move to all-gross calculations should be rejected.

D. Attaching Parties Should Be Assigned—And Should Pay For—One Foot of Attachment Space

In keeping with past communications engineering and construction practices, and with rate treatment for pole attachments, attaching parties should be assigned one foot of attachment space on a pole. This means that cable operators should be permitted to attach as many conductors that can be accommodated in that foot of space consistent with applicable safety requirements, and that they be charged only one attachment rate. Specifically, the Commission should reject utility contention that fiber optic conductors occupy two feet of space as the latest utility gambit to tax and penalize third-party fiber deployment.[45]

RCN, moreover, through its request that the Commission specifically find that the Commission find that the one-foot presumption not apply to facilities built on opposite sides of the poles, or to those using a side bracket,[46] has asked the Commission to institutionalize a form of discrimination that state regulators already have found unlawful.[47] RCN asked Commission approval for construction practices that pole owners have long refused to allow cable operators to use, and does so in order to avail itself of construction practices it seeks to employ in its joint

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[45] *See, e.g.*, Duquesne Light Co. Comments at 35-36.

[46] RCN Comments at 8-9.

[47] *Ohio Telecommunications Association, et al. v. Ameritech Ohio*, 1997 Ohio PUC LEXIS 288, Case No. 96-1027-TP-CSS (Pub. Util. Comm'n Oh. April 17, 1997).

ventures with large electric utilities such as Boston Edison Company and PEPCO and that would allow it to avoid large pole replacement and makeready costs that cable operators and others are required to absorb.[48] Grant of the request would hardwire just the kind of discriminatory practice into Commission policy that the Commission has so assiduously sought to avoid in this and related proceedings.

[48] In an effort to quickly deploy new broadband facilities into the Boston market, Boston Edison has permitted RCN to build in such grave violation of the NESC that it has provoked an investigation by the City of Somerville, Massachusetts (which is being closely monitored by the Massachusetts Cable Television Division). *Time Warner Cable v. Boston Edison Co. et al.*, Mass. Superior Ct. Dept. C.A. No. 97-5423-G. This example illustrates the skepticism with which utility should be met when they invoke "safety" concerns about cable operators overlashing fiber to existing facilities.

VII. CONCLUSION

For the foregoing reasons, we respectfully request the Commission to adopt regulations consistent with the principles set forth in these Reply Comments and our initial Comments.

Respectfully submitted,

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PROPOSED AMENDMENTS TO POLE ATTACHMENT RULES